Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	

JOINT REPLY COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
NATIONAL REALTY COMMITTEE
NATIONAL MULTI HOUSING COUNCIL
NATIONAL APARTMENT ASSOCIATION
INSTITUTE OF REAL ESTATE MANAGEMENT
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Summary

The overwhelming response of the real estate industry to the Commission's Notice of Proposed Rulemaking in this docket demonstrates the depth of the industry's concern. The prospect of Commission interference in the ability of building operators to effectively manage their properties is of enormous concern to the entire industry and a factor that the Commission should take into account.

The Commission should leave building access to the marketplace rather than attempting to impose one-size-fits-all rules. The commenters, like the industry in general, do not believe that Commission regulation that might affect the ability of operators of commercial and residential buildings to control access to their properties is necessary. The real estate

(212

business is extremely competitive, and landlords have very strong incentives to meet their tenants' needs. Over the long run, the building operators that do so will succeed, and those that do not will fail, because the real estate industry is not a monopoly.

The claims of "discrimination" and "gatekeeping" by telecommunications service providers reflect a lack of understanding of the influence tenants have over their landlords, and the costs to building operators of supervising the activities of service providers in their buildings. Building operators have no incentive to exclude service providers, so long as the additional costs of their presence in the building are met, and they provide services of acceptable quality.

Moreover, the Commission has no authority over building operators that would permit it to impose a right of access. The vast majority of building operators are not in the telecommunications business, and even those that are protected from physical invasion of their property by the Fifth Amendment. See Bell Atlantic v. FCC, 306 U.S. App. D.C., 333, 339, 24 F.3d 1441, 1447 (1994).

In addition, the dominant service providers are large businesses and fully capable of negotiating with their counterparts in the real estate industry. While some of these providers may desire that the Commission grant them certain advantages, the Commission should recognize that what these

To the extent the Commission has power to adopt regulations, the Commission should reflect the distinctions between various types of commercial and residential properties that require different treatment.

Finally, the Commission's power to establish any demarcation point is limited. The Commission's authority to prescribe demarcation points derives from its statutory authority to establish the rate base and regulate carrier services and does not include the right to preempt state property law. The Commission may define the demarcation point for these regulatory purposes, but such a definition neither implies nor requires that a service provider have the absolute right to physical access to the property. Congress did not withdraw from building operators their authority to control access to and the use of their property. Consequently, although there may be a general presumption that the demarcation point is at the property line, property owners retain the discretion to enter into agreements with service providers granting them access and perhaps establishing different demarcation points for different purposes. Under no circumstances should a tenant or resident have any right of access or ownership interest in wiring lying in the property of others outside the tenant's or resident's demised premises.

In summary, the comments of others in this docket fully support the proposition that Commission regulation of access to multi-unit buildings is unnecessary.

Table of Contents

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Introduction

The real estate industry strongly supports the positions taken by the joint commenters in our initial comments. We note that before the comment period closed on March 18, 1996, the Commission had received comments from approximately 220 firms and associations connected with the real estate industry, all fundamentally supporting the positions taken by the joint commenters. When comments received after the deadline are included, 80% of the approximately 339 submissions responding to the January 26, 1996, Notice of Proposed Rulemaking (the "NPRM") were filed by owners and managers of commercial and residential buildings. The prospect of the Commission's intervening in the ownership and management of real property obviously concerns the industry enormously. The Commission should consider the

magnitude of the real estate industry's opposition to any Commission intrusion into the real estate market.

I. THE COMPETITIVE CHARACTERISTICS OF THE REAL ESTATE MARKET OBVIATE THE NEED FOR COMMISSION REGULATION OF ACCESS TO PRIVATE PROPERTY.

As we stated in our initial comments, the real estate market in the United States is free and competitive. The Commission has no authority to regulate the real estate industry, and it should not attempt to do so in a misguided and ill-conceived attempt to give the telecommunications industry leverage in its relationship with the real estate industry. Telecommunications service providers, like building operators, are managed by capable and rational business executives, who can protect their own interests. The Commission should not distort an otherwise free marketplace for no reason.

A. Marketplace Dynamics Will Foster Access to Property.

Commercial tenants and apartment residents have options, and they frequently exercise them. Building owners that respond to the market will succeed, while those that do not will fail. Access to telecommunications services is one of the property features that are factored into the decisions of tenants and residents, and landlords accordingly take the issue of access into consideration as well.

William F. Tynan, Vice President of LCOR Incorporated, an owner and developer of commercial and residential property, put it this way in responding to the NPRM: "The real estate industry is fragmented and very competitive. If a particular wiring

configuration is demonstrably more beneficial to a meaningful number of tenants, property owners will offer it for competitive reasons."

Indeed, Commission regulation would almost certainly be counterproductive and in any case could not improve on the actions of the free market that currently exists. Market forces, on the other hand, will encourage property owners to allow service providers access to their tenants. Allowing building owners to freely contract with service providers is the only way to assure competition. Comments of RTE Group, Inc., at 4.

Furthermore, market negotiations are the best way to resolve the issues associated with access to private property. The simple fact is that such questions as space limitations cannot be adequately handled through regulation, but the market can and does allocate scarce resources very efficiently. See Comments of the International Council of Shopping Centers at 6-7. For example, the shared tenant services industry responds to the problems of space allocation and management of safety, security, and maintenance while still offering building tenants competitive choices. See Comments of National Private Telephone Association.

A leading telecommunications service provider, Ameritech, has acknowledged not only that forced access is not necessary, but that the market will ensure that access is available:

> Where there is no statutory right to access private property, cable operators and telephone companies alike will be required to negotiate access rights with property owners. Those owners will have no incentive not to grant reasonable access rights if the company seeking the access provides high quality, low cost services to which the owners, or

> their tenants, want to subscribe. Therefore, the best way for the Commission to promote open access to private property is for it to foster an environment where multiple providers of high quality, low cost services are available to customers. The demand for those services will precipitate open access -- naturally, voluntarily and according to market-based terms and conditions,

Comments of Ameritech at 20.

MFS Communications Company, Inc. ("MFS"), however, claims that building operators unfairly discriminate among service providers and that the Commission should act to prevent this. Comments of MFS at 3-12. As we noted in our initial comments, however, MFS and other competitive access providers ("CAPS") have no grounds for complaint. Over the last five years, the CAP industry has grown enormously, because tenants have requested that landlords allow them access to the services provided by the CAPs, and landlords have complied. Indeed, there would be no CAP industry today if building owners were intent on discriminating and erecting barriers to entry. The CAP industry is a perfect illustration of how the real estate industry responds to market demands by tenants, without any Commission regulation.

MFS also asserts that building operators should not be allowed to charge service providers different fees for access to a building, but should charge a pro rata fee based on the number of customers served in the building. Once again, MFS calls for the Commission to distort the free market. MFS is perfectly capable of negotiating access terms with building owners. Building owners have no incentive to charge so called "arbitrary"

or "discriminatory" fees in the face of tenant demands for service from MFS or any other provider.

In addition, landlords must be free to negotiate access fees that compensate them fairly for the use of their property and the associated management costs. Otherwise, a landlord would have to give access to every service provider that requested it, regardless of the increased costs of dealing with the additional service providers. For example, a building operator might have five service providers in a building, four of whom might be serving only a single tenant, and a fifth serving the remaining 20 tenants in the building. Under MFS's plan, the landlord would quintuple the number of service personnel it has to deal with, while receiving exactly the same amount of compensation as it did with one service provider in the building.

Thus, the Commission need not concern itself with the claimed "discrimination." It either does not exist or is simply a rational response to market conditions. The Commission cannot possibly handle the matter any more efficiently than the market can.

B. The Commission Has No Authority to Regulate the Real Estate Industry.

The Commission has the authority to regulate the activities of telecommunications service providers and other entities that are active in the field of telecommunications. It may even regulate the manner in which telecommunications service providers enter other areas -- but it does not have the authority to regulate entities whose activities fall outside its jurisdiction

over telecommunications. See GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). In other words, the Commission may not regulate the real estate industry and may only regulate building operators to the extent that they subject themselves to its jurisdiction by providing telecommunications services or facilities. And even that authority is limited. See Bell Atlantic v. FCC, 306 U.S. App. D.C., 333, 24 F.3d 1441, 1447 (1994).

Accordingly, the comments of MFS notwithstanding, the Commission cannot order building operators to allow service providers access to their risers and conduits, or to any other part of their property.[1] Indeed, any such requirement would constitute a taking under the Fifth Amendment, as discussed in our initial comments herein. Op. cit. at 5-8.

MFS also urges the Commission to require property owners who restrict access to inside wiring to the minimum point of entry to provide access to that point so that the traffic of more than one service provider may be carried over the same set of internal wiring. Such access would be granted to any service provider

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[1] The Commission may have authority over building operators that do provide telecommunications services to their tenants or residents. In such cases, however, the fact remains that tenants choose buildings because of the amenities and services offered by the building owner. Were the Commission to prohibit building owners from providing such services by requiring them to provide access to all comers, the Commission would actually be reducing the choices available to consumers, when looking at the market as a whole. See attached advertising supplement describing telecommunications services available to residents of certain properties operated by Charles E. Smith Residential Realty. Washington Post, April 3, 1996.

that requests it. Comments of MFS at 5. DIRECTV, Inc. makes the same argument with respect to property owners who own inside wiring. Comments of DIRECTV at 2.

Here again, the commenters are proposing a right of access to the building owner's property. Access to a telephone vault in the basement still imposes costs on the building owner. Such costs may not be as great as those imposed by a right of access to risers and conduits throughout the building, but they are finite. And any physical occupation of property by a service provider's facilities that is mandated by the Commission -- however small -- remains a taking.

For the same reasons, the Commission has no authority to adopt the equivalent of a state mandatory access statute, as suggested by the New Jersey Board of Public Utilities and Guam Cable TV.

MFS likens exclusive access arrangements to easements and asserts that they are preempted by Section 253 of the Telecommunications Act of 1996. Comments of MFS at 4. This is an incorrect interpretation of the law. The 1996 Act prohibits only barriers to entry erected by "State or local statute or regulation, or other State or local legal requirement . . . ." This language was clearly intended to apply to local laws, ordinances and regulations adopted by State and local governments, and not private agreements. Even if a grant of access were an easement under state law (a matter which probably

differs from state to state) an easement is not a "State or local legal requirement."

Nor can the Commission require all property owners to grant cable operators access to any easement, as urged in the Comments of Charter Communications Inc. and Comcast Cable Communications, Inc. As discussed in our initial comments, the Commission would have to overrule numerous court decisions interpreting Section 621(a)(2) of the Cable Communications Policy Act of 1984 to reach such a result, and Congress has never granted the Commission authority to expand existing easements in that fashion.

Finally, Congress just completed the most comprehensive revision of federal telecommunications law since the Communications Act of 1934 was enacted. If Congress had desired to provide the telecommunications industry with the right to enter private property to provide services to tenants and residents, it could have done so. Yet the 1996 Act contains no such express statement, nor does it authorize the Commission to mandate access. Consequently, the Commission cannot do so.

C. Service Providers Are Businesses With Sufficient Negotiating Power to Protect Their Own Interests.

As mentioned above, service providers are perfectly capable of striking their own deals with building owners. Service providers are not babes in the woods needing government protection, but large businesses run by capable adults. The Commission cannot guarantee the success or profitability of every technology and every potential service provider, nor should it attempt to do so.

For example, the satellite industry, represented by DIRECTV, wishes to obtain access to wiring installed by the cable industry. Rather than negotiate for the installation of its own wiring or for the right to use existing wiring, DIRECTV hopes the Commission will give DIRECTV a cheaper alternative. Likewise, the cable industry desires to prevent DIRECTV and other wireless and satellite operators from obtaining access to existing wiring to prevent them from gaining access to current cable customers. And both industries claim that building owners are creating a bottleneck merely because they sometimes charge for the right to use their property, so the Commission must force access. This is understandable behavior on the part of the telecommunications industry, but not necessarily behavior that the Commission should reward.

The Commission must consider that building owners deliver a valuable service to service providers by creating desirable environments for people to live and work. In the process, building owners create dense -- and therefore desirable -- service areas for the telecommunications industry. Rather than complain about access fees, service providers should recognize that they are paying for access to a market that the real estate industry has literally built for them.

Landlords do not behave maliciously or capriciously in this respect, but rationally. The need for a particular service must outweigh the various costs of providing it before it will become available in any market. This is particularly the case when an

alternative to the service is already available. Thus, landlords are not gatekeepers or bottlenecks - they have nothing to gain from such behavior. They are simply rational business people making rational business decisions for their individual properties. If the Commission interferes, it will simply distort economic realities.

For example, if the Commission were to adopt MFS's proposal to force building owners that control their inside wiring to allow others access to that wiring at the demarcation point, there would probably be circumstances in which building owners would elect to manage their buildings differently. Thus, they might instead allow a single provider access to all of their risers and conduits, so as to escape the Commission's regulation, in the process actually reducing subscribers' options and forcing competitors out. (As noted above, we do not believe the Commission could do anything about such a decision, because forcing physical access to risers would be beyond its statutory authority and prohibited by the Fifth Amendment.)

If service providers need access, they can agree on terms of access with the property owner; property owners have no incentive to ban or restrict service providers from providing good service to tenants. NJBPU would force access on the grounds that cable operators must have the right of access so they can conduct maintenance and repairs. This example actually illustrates our point very well. Building operators have no incentive to ban entry by qualified personnel performing work required for service

providers to meet their obligations to tenants. In fact, a landlord has every interest in ensuring that maintenance and other work is done promptly and efficiently. Consequently, they will grant such access, subject to the right to control access for security and safety reasons, as discussed in our initial comments. The marketplace works perfectly well for this purpose, and Commission regulation cannot possibly do better.

USWest alleges that the number of building owners taking responsibility for their own wiring is increasing, which is supposedly leading to more exclusive contracts and less choice for subscribers. We note that USWest has introduced no evidence of their claim. We find it hard to believe that there were actually more buildings served by multiple providers at any time in the past than there are today. As noted in the comments of Ameritech cited above, the best thing the Commission can do is foster competition within the telecommunications industry -- as more choices become available, building owners will make those choices available to their tenants and residents, because tenants and residents will demand them.

II. THE COMMISSION SHOULD NOT ATTEMPT TO TREAT ALL TYPES OF PROPERTY THE SAME WAY.

As we noted in our initial comments, the distinctions between various types of commercial and residential properties require that they be treated differently. Thus, it may be necessary to establish different demarcation points for different types of properties. See Comments of DIRECTV at 10. Indeed, the current telephone inside wiring rules recognize that

configurations vary from building to building and these variations must be accommodated. See Comments of NJBPU.

It may also be necessary to make other distinctions between commercial and residential procedures, and between different types of property within those categories. The Commission should not limit itself to concerns about differences in technology or the type of service involved.

III. THE COMMISSION'S AUTHORITY TO ESTABLISH A DEMARCATION POINT DERIVES FROM THE COMMISSION'S AUTHORITY TO DEFINE THE RATE BASE AND REGULATE CARRIER SERVICE OFFERINGS; IT DOES NOT INCLUDE THE RIGHT TO TRANSFER PROPERTY RIGHTS.

The Commission should not deceive itself into thinking that its power to prescribe demarcation points carries with it the power to dictate ownership in property. The Commission has the authority to prescribe a uniform system of accounts for carriers and to regulate the classes of property for which depreciation may be claimed. 47 U.S.C. § 220. The Commission may also regulate the services offered by carriers. 47 U.S.C. § 201. The Commission's authority to establish the demarcation point flows from these two statutory provisions, neither of which gives the Commission the right to preempt or transfer property rights. Consequently, the Commission may not use the power to establish the demarcation point as a justification for preempting a building owner's ownership rights under state law.

A. The Demarcation Point is a Tool for Accounting for a Service Provider's Costs, not a Means of Transferring Property Rights from Building Owners to Service Providers.

An analysis of the history of telephone inside wiring shows that the FCC first developed federal policy with respect to a demarcation point as part of the deregulation of telephone wiring, in order to facilitate accounting for such wiring. But the Commission also recognized that a precise identification of a single point of demarcation to distinguish that portion of the investment which will continue to be capitalized and that portion which will be expensed cannot be made for each and every circumstance." Uniform System of Accounts: First Report and Order, Docket 79-105, 85 F.C.C.2d 818, 826 (1981).

Subsequently, the Commission began using the concept of the demarcation point to define the point at which the telephone company's facilities terminated and the customer's began. Review of 68.104 and 68.213 Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 4686, 67 R.R.2d 1280 (1990) ("The demarcation point has served for both establishing the permissible points of connection by customers of wiring and CPE and for accounting purposes."); Amendment of Part 68; Second Notice of Proposed Rulemaking and Order, Docket 81-216, 92 FCC 2d 1, 8 (1982).

The mere fact that the demarcation point specifies the place at which responsibility for the communications service may change does not mean that physical access to the wiring up to that point can be required, or is permitted, by administrative fiat. The

Commission has never had the authority -- or claimed to have the authority -- to require a property owner to grant a service provider access to the demarcation point merely because the service provider happened to be responsible for the service over the wire. And nothing in the regulatory history indicates that the establishment of the demarcation point preempts state law regarding the ownership of property or effects a transfer of property ownership from one person to another. Of course, such a rule would be unnecessary in practice because it is in the interest of the property owner -- who wants the service offered by the service provider, either for itself or for its tenants and residents -- to make such access available.

Any attempt to base access to real property on an administrative accounting convention is foredoomed to failure. Ownership of inside wiring may be determined by the law of fixtures in each state and agreement between the parties by contract on who owns the wiring in each individual building. These factors may affect the ownership of the wiring, but again neither requires that the owner of the wiring have access to a building without the landlord's consent and supervision. These factors combine to require complex individual determinations of who owns what wiring. Any uniform action by the Commission purporting to affect ownership rights would inevitably have the effect of taking property of at least some entities in at least some states.

For example, under state fixture laws (either common law or statutory), a fixture is defined as personalty that upon being affixed to realty takes on the character of and becomes a part of that realty. However, as with most aspects of fixtures law, the definition varies between jurisdictions. Custom, conflict of laws, statutory provisions and the like, all work to define fixtures laws differently in various jurisdictions. Thus, whether wire or cable is deemed a fixture or merely personal property in a jurisdiction will often determine the ownership of the cable.

Whether an item is deemed a fixture is largely dependent on examining the facts and circumstances, which in most jurisdictions includes an analysis of such factors as the intention of the parties, particularly the person who annexes or attaches the personalty to the realty; sufficiency of the annexation; the use to which the annexed article is being put and how well it is adapted to the general use or purpose of the realty; and annexation by or consent to annexation by the personalty owner.

Most jurisdictions hold that articles attached to premises by the tenant in a permanent manner are fixtures which cannot be later removed by the tenant. Even if the Commission were to adopt a rule giving the tenant ownership at the time of installation, in such jurisdictions the ownership of the wire would pass to the landlord by operation of law. Thus, in some jurisdictions, wiring that has been installed by a cable operator

in a property owner's building becomes a fixture that is deemed owned by the property owner. In other jurisdictions, if the wiring can be removed without injury (however that term may be defined in that jurisdiction) to the land owner, the cable operator presumably retains ownership of the wire. Finally, as noted by NJBPU, state tax laws may also have a bearing on whether a chattel becomes a fixture or not.[2]

Given the range of factors and rules which are used to determine if wiring is a fixture, it is clear that a state-by-state, property-by-property application of fixture law would be required to determine the effects of any uniform Commission rules tying physical access to the demarcation point. Such an approach by the Commission would not be lawful, administratively practicable, or operationally desirable.

B. The Commission May Set the Demarcation Point Where It Pleases, so Long as it Does Not Interfere With the Landlord's Right to Control its Property.

For accounting purposes, the Commission may set the demarcation point wherever it is empowered to do so -- the crucial consideration to building operators is preserving their rights to manage and control access to their properties.

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[2] Several commenters have urged a greater role for federal regulation of inside wiring and at least one has called for exclusive federal control of all inside wiring. See Comments of DIRECTV at 13. Although we do not believe that transferring ownership of wiring is necessary to address the issues the Commission has raised, we recognize that preempting all state and local regulations to impose a uniform system of federal regulation might have that effect. Instead, the Commission should follow the suggestion of Motorola, Inc., to minimize regulation. Comments of Motorola at 6.

Treatment of wiring for regulatory purposes can be handled in a number of ways, but regulatory accounting does not require that the service provider have physical control of the wiring or forced access to the premises on which it is emplaced. For example, DIRECTV has proposed the use of a "virtual demarcation point," which is not a physical location but a concept that would allow two or more service providers to share bandwidth on a single wire. Comments of DIRECTV at 8-9. We do not cite this proposal for the purpose for which DIRECTV introduces it, but to make the point that if two or more entities are sharing a wire, that wire can still be included in the rate base for each provider, even though they share ownership and neither necessarily has access to it.

Thus, the Commission can address regulatory concerns without necessarily affecting the rights of building operators to control and manage their property.

C. The Demarcation Point Should Be at a Place Determined by the Property Owner by Agreement with the Service Provider.

We wish to clarify and reemphasize a point we made in our initial comments. Building operators are not unanimously in favor of placing the demarcation point in one particular place. Some believe it should be at the property line, others that it should be at a single point in the basement of the building, others that it should be in a phone vault on each floor of a building, and others that it should be directly outside a tenant's premises. Particular buildings have distinctive

configurations and uses, and individual owners have different interests and concerns regarding the management and control of wiring. All the same, the owners are unanimous in stressing the need to retain that degree of control over their property as they choose to exercise. Some building owners are prepared to assume the responsibility of owning and maintaining inside wiring, but others are not. For convenience, the demarcation point should be presumed to be at the property line, but it would not be appropriate or practical to impose a single uniform demarcation point.[3] Many building owners may choose to allow service providers access to their risers and conduits, and in such cases may wish to agree on different demarcation points for operational purposes.

If a building owner chooses to exclude providers and retain ownership and control over the wiring, it has that right. But if a building owner chooses not to own the wiring and to permit service providers access to the building, it has that right, also. That decision is not governed by an accounting convention, nor does the owner's decision necessarily control the carrier's accounting.

As noted by BellSouth, "Historically, telephone companies and private property owners have negotiated for rights to use

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[3] Most commenters argue in favor of customers having access to wiring inside their premises. We concur with this view, although there are some respects -- such as in the case of an apartment resident -- in which customer access and ownership of wiring is of limited value to the customer. In any event, under no circumstances should a tenant or resident have any ownership or access rights in wiring outside of the demised premises.

private property with reference to state customs and practices and without interference from the FCC. . . . Cable operators and MDU owners should have the corresponding freedom to allocate their rights and responsibilities through negotiations." Comments of Bell South at 5.

USWest calls for a plan under which existing buildings would be grandfathered, and for new construction the Commission would provide building owners with a range of options for demarcation based on technology and the owner's needs. Comments of USWest at 7. We oppose this proposal because it imposes too great a restriction on building owners' property rights, but at least it recognizes the need for flexibility and the likelihood that the owner's needs will vary.

In any event, the location of the demarcation point should not be allowed to interfere with a building owner's right to control its property, for the reasons set forth in our initial comments.

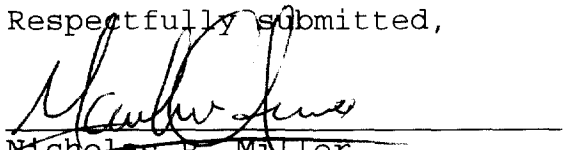
Conclusion

The Commission should recognize that it lacks jurisdiction to order the owners of multi-unit buildings to allow telecommunications providers to emplace their facilities on private property and that, in any event, there are sound and persuasive reasons why the Commission should not attempt to regulate access to multi-tenant buildings.

Accordingly, the Commission should (i) decouple the access-to-property and the demarcation-point issues in its NPRM, (ii)

abandon any attempt to deal with access to private property, and (iii) adopt rules for the specific demarcation point and other wiring issues raised by the NPRM that reflect the realities of the diverse physical and market characteristics of multi-tenant buildings.

Respectfully submitted,



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